SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 476

JAMES SHROUT, d/b/a THE SHROUT AGENCY,
Petitioner,

vs.

McDONALD'S SYSTEM, INC., an Illinois corporation, and RAY KROC,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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STATEMENT OF THE CASE

Petitioner's Statement of the Case ignores Supreme Court Rule 23(f), and omits numerous important facts relied upon by the Illinois Circuit Court, Appellate Court and Supreme Court in rejecting petitioner's claim. Reluctantly, respondents submit herewith their own statement.

Petitioner's advertising agency was paid a total of $64,295.33 by respondent McDonald's in return for services rendered from May, 1957 to December 31, 1961. From May, 1957 to June 12, 1961 petitioner performed such services and received from McDonald's total payment of $38,801.88. Petitioner cashed all payment checks and at no time protested the amounts.

During this period, McDonald's licensees paid petitioner for certain advertising merchandise, but petitioner failed to pay the merchandise suppliers. These suppliers then repeatedly harassed the licensees for payment. Since they had already paid, the licensees then complained to McDonald's about petitioner. As a result, the parties realized that the arrangement was unworkable, and decided to enter into a new arrangement.

On June 12, 1961, petitioner and McDonald's executed a written agreement terminating the oral agreement and any other obligations and requiring petitioner to furnish further advertising services and supplies for an agreed compensation. This agreement operated under the following provision to sever all prior obligations:

> "The parties hereto desire to enter into the present agreement and thereby revoke and cancel all previous agreements, contracts and commitments relating to the advertising and promotion programs heretofore entered into by said parties . . ."

Thereafter petitioner performed advertising services under the written agreement in return for $25,493.45. The written agreement was then terminated pursuant to its terms as of December 31, 1961.

The original complaint, containing a jury demand, was filed December 31, 1963 "IN EQUITY," seeking, *inter alia*, rescission of the written agreement of June 12, 1961. The rescission Count was stricken as legally insufficient on December 2, 1964 and the remainder of the action was ordered transferred from the Equity Division to the Law Division of the Circuit Court of Cook County, Illinois. The Law Division then dismissed the remainder of the original complaint. At the time of the transfer from Equity to Law, petitioner did not renew its jury demand, nor did it include such a demand in the subsequently filed amended complaint.

Respondents then moved to dismiss the amended complaints under Sections 45 and 48 of the Civil Practice Act of Illinois, Ill. Rev. Stat. 1967, ch. 110, §§ 45, 48, on the ground that the claim for additional compensation prior to June 12, 1961 was barred, *inter alia,* by the express language of the written agreement quoted above. Supporting and counter-affidavits were filed, and the Circuit Court, after briefing and oral argument, dismissed the amended complaint.

Petitioner appealed to the Illinois Appellate Court which, after extensive briefing and oral argument by the parties, affirmed in part as follows (App. 18a - 19a)[1]:

> "Plaintiff's claim under Count 1 [the only one petitioner now advances] is barred by the contract of June 12, 1961, which expressly states that the parties thereto revoke and cancel 'all previous agreements, contracts and commitments relating to the advertising and promotion programs' theretofore entered between the parties. . . ."
>
> "Plaintiff is further barred from recovery under this count for the reason that the dealings between plaintiff and McDonald's under the oral contract resulted in an account stated between the parties which plaintiff is now estopped to deny. Throughout the term of the oral contract plaintiff was periodically compensated by McDonald's for his services as advertising agent. The monies paid by McDonald's were accepted by plaintiff without question or protest. It was not until some two and one-half years after the oral agreement was terminated that plaintiff determined he was entitled to more compensation under the oral contract than he had in fact received and accepted without contest. (See 1 C.J.S. Account Stated § 1 et seq.)"

Petitioner filed a petition for rehearing in the Illinois Appellate Court (App. 8a - 15a), but did not raise any of the federal constitutional questions presented in the instant

[1] App. references are to petitioner's appendices.

certiorari petition. The Appellate Court denied the petition without opinion.

Petitioner then filed a petition for leave to appeal in the Illinois Supreme Court (App. 22a - 36a), for the first time raising the due process question presented in Part I of the instant certiorari petition but not raising the equal protection question presented for the first time in Part II of the instant certiorari petition. The Illinois Supreme Court denied the petition without opinion (App. 37a).

ARGUMENT

Preface:

After having its claim for additional compensation in effect rejected by no less than *three* State courts (Circuit, Appellate and Supreme), petitioner has seized upon a single Appellate Court dictum in a desperate search for a federal constitutional issue. However, since neither the due process nor the equal protection issues here advanced were presented in timely fashion below, this Court is without jurisdiction to grant certiorari. Similarly, jurisdiction is lacking because the claim for additional compensation was rejected on non-federal grounds which are not here questioned.

Moreover, the claim of deprivation of equal protection is not well founded. Under Illinois statute, the constitutionality of which is not here questioned, petitioner waived its jury demand by failing to renew it when the case was transferred from Equity to Law. The petition should be dismissed for lack of jurisdiction or denied.

I.

THIS COURT LACKS JURISDICTION TO GRANT THE WRIT OF CERTIORARI; NO CONSTITUTIONAL RIGHT OF PETITIONER WAS INVADED BY THE ILLINOIS APPELLATE COURT CHARACTERIZING THE ORAL ARGUMENT AS "FULLY EXECUTED" AND "EXPRESS".

Petitioner's main contention is that the Illinois Appellate Court characterization of the oral agreement violated its constitutional rights under the fourteenth amendment. It raised this question for the first time, not in its petition for rehearing addressed to the Illinois Appellate Court, but as an afterthought in its petition to the Illinois Supreme Court for leave to appeal. Thus, the constitutional issue

was not presented to the Appellate Court, although it could have been, and the Appellate Court had no opportunity to correct itself. Petitioner did not discharge its burden to present the question at the earliest time and to obtain a decision from the highest state court.

This case thus falls within the well-established rule that the Supreme Court will not review a federal question which was not properly raised before the highest state court. As this court stated in *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1965):

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it (citing cases)."

In the instant case neither the Illinois Appellate Court nor the Illinois Supreme Court ruled on the federal constitutional question. Accordingly, the question is not proper for a certiorari petition.

Furthermore, the Supreme Court is without jurisdiction because it will not review a state court decision resting upon an adequate and independent non-federal ground. Petitioner's Count I claim for further compensation was held by the Illinois Appellate Court to be barred by the express language of the agreement of June 12, 1961, and because there was an account stated which, under state law, precluded further recovery. Petitioner makes no claim that either of these holdings were incorrect, that they constituted findings of fact, or that they raise important questions of federal or state law which are appropriate for review on certiorari. Thus, petitioner is resigned to the fact that on the non-federal merits its claim has no hope.

The sole argument addressed to this Court concerns the remark the Appellate Court made in refuting petitioner's *quantum meruit* argument, a remark made immediately *after* it had held that the claim was barred by the written agreement:

> "Plaintiff's claim under Count I is barred by the contract of June 12, 1961, which expressly states that the parties thereto revoke and cancel 'all previous agreements, contracts and commitments relating to the advertising and promotion programs' theretofore entered between the parties. The contention that an action in *quantum meruit* is 'an action off the contract and not on the contract' is unavailing inasmuch as there did in fact exist between the parties a fully executed express contract. See *Goodman* v. *Motor Products Corp.*, 22 Ill. App. 2d 378, 384-385."

At this point, two things are clear. First, in view of the court's interpretation of the legal import of the written agreement, designating the oral contract as "executed" was a *legal* question for a court, not a fact question for a jury. Indeed, in the face of the express language relied upon by the court, could the prior oral contract be termed anything but fully executed? Clearly not. No amount of further evidence by petitioner could possibly change the legal effect of the written agreement.

Second, the remark that there had been a "fully executed express contract" is dictum, and the result would have been the same no matter how the contract had been characterized. It is clear that nothing turns on this remark. Petitioner is saying that a purely hypothetical question may somehow be transformed into a full-blown constitutional question eligible for Supreme Court review, notwithstanding that its resolution will have no effect on the legal rights of the parties or the correctness of the lower court decision.

This is an incorrect view of Supreme Court jurisdiction. The rule was concisely stated by this Court in *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 129 (1945):

> "This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. 'Where the judgment of the state court rests on two grounds, one involving a federal question and the other not . . . and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.' *Lynch* v. *New York*, 293 U.S. 52, 54-55."

In addition, the Appellate Court's reliance on the *Goodman* case further demonstrates the correctness of the characterization. It is hornbook law, and law in Illinois for over a century, that where an express contract exists a court may not imply one. In *Goodman* the Illinois court affirmed the dismissal of a count which pleaded *quantum meruit* where an express contract existed, on the following ground:

> "There can be no implied contract or recovery in *quantum meruit* where an express contract exists between the same parties with respect to the same subject matter . . . only when parties do not expressly agree, or where an express agreement is unenforceable, the law imposes and raises a promise to pay for services performed or goods furnished under circumstances justifying an implied agreement to compensate." 22 Ill. App. 2d 378, 384-85 (1959).

Thus, since there was at all times from May, 1957 to June 12, 1961 an express oral agreement to perform services for reasonable compensation, there could not have been a meri-

torious *quantum meruit* claim. In fact, it does not even matter that an express agreement may be "executed". The mere fact of its *existence* forecloses *quantum meruit*. Here, too, further evidence by petitioner would be unavailing.

The Appellate Court based its affirmance on uncontraverted facts—the language of the agreement and the acceptance of monies by petitioner without protest. Petitioner's claim has been fully litigated and decided with proper deliberation, and there is no constitutional issue correctly presented for review.

II.

PETITIONER DID NOT RAISE THE EQUAL PROTECTION ISSUE IN TIMELY FASHION.

Petitioner claims that the Appellate Court deprived it of "equal protection" by denying it a jury trial. Actually, this ground was never presented to *any* of the State Courts involved, and is urged here for the first time. Petitioner contended for the first time in its petition for appeal to the Illinois Supreme Court, and not before the Appellate Court, that its jury trial right had somehow been abridged under the seventh and fourteenth amendments to the United States Constitution. However, it abandoned these grounds in the face of *Walker* v. *Sauvinet*, 92 U.S. 90 (1875), *Pearson* v. *Yewdall*, 95 U.S. 294, 296 (1877), and *Oleson* v. *Trust Co. of Chicago*, 245 F.2d 522, 524 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957), which hold that neither amendment guarantees a jury trial in a state court civil case. The "equal protection" assertion, made to this Court for the first time, was not made in timely fashion and hence cannot form a jurisdictional basis for granting the writ.

III.

PETITIONER, HAVING WAIVED ITS JURY RIGHT UNDER VALID STATE LAW, HAD NO CONSTITUTIONAL RIGHTS VIOLATED.

In addition, petitioner waived its jury right by failing to comply with the express requirement of the Civil Practice Act of Illinois, Ill. Rev. Stat. 1967, ch. 110, § 64 that:

> ". . . in any proceeding transferred in whole or in part from the equity docket to the law docket a plaintiff desirous of a trial by jury must file his demand with the clerk within three days from the day the order of transfer is entered . . . otherwise the party waives a jury . . ."

The original complaint was expressly denominated and was filed "IN EQUITY". No authority need be cited for the proposition that there is no jury trial of right in equity cases. On December 2, 1964, when the rescission count was stricken, the remaining cause was expressly ordered transferred from the Equity Division to the Law Division of the Circuit Court. Since the petitioner did not file a jury demand within three days, it waived a jury.

Secondly, petitioner's reliance on Ill. Rev. Stat. 1967, ch. 110 § 48 (Petition, p. 13) is entirely misplaced. It is only where a "material and genuine disputed question of fact is raised" that the court must deny the motion to dismiss "if the action is one at law and a jury demand has been filed by the opposite party in apt time." In the instant case, there were no material facts which were disputed. Petitioner's repeated insistence that it was not "fully paid" is mere hyperbole. Moreover, the case was not filed "at law", and a jury demand was not filed "in apt time."

As far as "equal protection" is concerned, it is clear from the foregoing provisions of the Civil Practice Act of Illinois that all litigants in petitioner's position are treated the same. The prison inmate case and other cases relied upon by petitioner are inapposite. No litigant which waives jury trial subsequently becomes eligible for such trial as a matter of right.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be dismissed for lack of jurisdiction, or denied.

Respectfully submitted,

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APPENDIX

1. Ill. Rev. Stat. 1967, ch. 110, § 45(1), (2), (4).

§ 45. **Motions with respect to pleadings.** (1) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

(2) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.

• • •

(4) After rulings on motions, the court may enter appropriate orders either to permit or require pleading over or amending or to terminate the litigation in whole or in part.

• • •

2. Ill. Rev. Stat. 1967, ch. 110, § 48(1)(i).

§ 48. **Involuntary dismissal based upon certain defects or defenses.** (1) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

• • •

(i) That the claim or demand asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim or demand.

• • •

3. Ill. Rev. Stat. 1967, ch. 110, § 64(1), (2).

§ 64. **Jury demands—Findings of fact in law and equity cases—Effect of overruling motion for finding in non-jury cases.** (1) A plaintiff desirous of a trial by jury must file a demand therefor with the clerk at the time the action is commenced. A defendant desirous of a trial by jury must file a demand therefor not later than the filing of his answer. Otherwise, the party waives a jury. In any proceeding transferred in whole or in part from the equity docket to the law docket a plaintiff desirous of a trial by jury must file his demand with the clerk within 3 days from the day the order of transfer is entered and a defendant desirous of a trial by jury shall file his demand within 6 days from that day; otherwise the party waives a jury. If the plaintiff files a jury demand and thereafter waives a jury, the defendant shall be granted a jury trial upon demand therefor made promptly after being advised of the waiver and upon payment of the proper fees, if any, to the clerk.

(2) No special findings of fact, propositions of law, motion for a finding or demurrer to the evidence are necessary in any case at law tried without a jury to support the judgment or as a basis of review. The sufficiency of the evidence to support the judgment is subject to review without formal action to preserve the question.

• • •